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North Dakota Supreme Court Review

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NORTH DAKOTA SUPREME COURT REVIEW

The Supreme Court Review briefly summarizes the important decisions rendered in 1982 by the North Dakota Supreme Court. The purpose of the review is to indicate cases of first impression and cases that significantly affect earlier interpretations of North Dakota law.

The following topics are included in the review:

ADMINISTRATIVE LAW

Nelson v. North Dakota Workmen's Compensation Bureau

In *Nelson v. North Dakota Workmen's Compensation Bureau*[1] the Workmen's Compensation Bureau (Bureau) appealed from a district court judgment ordering the Bureau to make an award to

1. 316 N.W.2d 790 (N.D. 1982).

Mrs. Nelson.[2] Mrs. Nelson was the widow of a truck driver who died at work.[3] She filed a claim for death benefits with the Bureau, alleging that unusual stress caused her husband's heart attack and death.[4] The Bureau denied the claim, and Mrs. Nelson petitioned for a rehearing.[5]

Following the submission of depositions by Mrs. Nelson, a fellow worker, and a doctor, the Bureau issued an order affirming dismissal of the claim.[6] The Bureau concluded that the claimant failed to satisfy the statutory requirements for an award of death benefits.[7] Mrs. Nelson appealed the order to the district court, which determined that Mrs. Nelson did prove the requirements.[8]

On appeal to the supreme court, the court held that the portion of section 65-01-02(8)[9] defining "injury" was applicable.[10] This provision requires that a heart attack be both causally related to employment with reasonable medical certainty and precipitated by unusual stress.[11] The court stated that it did not construe the statute as requiring absolute medical certainty.[12] Reasonable medical certainty is sufficient to establish the cause of death.[13] The testimony and other evidence in *Nelson* met this requirement.[14]

The court next addressed the Bureau's claim that the heart attack was not causally related to employment and that it was not precipitated by unusual stress.[15] The court stated that the employment does not have to be the sole cause of the heart attack because the employer takes the employee as he finds him.[16] Regarding the unusual stress requirement, the court adopted the rationale of a Colorado case that held that "unusual or extraordinary exertion . . . does not require that the work causing the attack be different in nature from the employee's usual work. The unusual overexertion doctrine must be applied according to

2. Nelson v. North Dakota Workmen's Compensation Bureau, 316 N.W.2d 790, 791 (N.D. 1982).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 792-93.
8. *Id.* at 793.
9. *See* N.D. CENT. CODE § 65-01-02(8) (Supp. 1981). Section 65-01-02(8) provides as follows: "If an injury is due to a heart attack or stroke, such heart attack or stroke must be causally related to the worker's employment, with reasonable medical certainty, and must have been precipitated by unusual stress." *Id.*
10. 316 N.W.2d at 793.
11. *Id.*
12. *Id.* at 794.
13. *Id.*
14. *Id.*
15. *Id.* at 794-96.
16. *Id.* at 795 (citing Stout v. North Dakota Workmen's Compensation Bureau, 236 N.W. 2d 889 (N.D. 1975)).

the employee's work history rather than the work patterns of his profession in general."[17] The supreme court concluded that as applied to the facts in *Nelson,* the plaintiff did not prove such unusual stress.[18] The evidence was insufficient to conclude that unusual stress in the course of employment precipitated the heart attack.[19] The court reversed the district court judgment and affirmed the Bureau's decision to dismiss the claim.[20]

CIVIL PROCEDURE

City of Minot v. Central Avenue News, Inc.

In *City of Minot v. Central Avenue News, Inc.*[21] Central appealed for the second time to the supreme court, opposing Minot's efforts to regulate Central's adult bookstore operation.[22] Central raised two issues: whether section 40-05-17 of the North Dakota Century Code defines "adult bookstores"[23] and whether a contempt citation based on a vague court order is proper.[24] The supreme court stated that the determination of these issues would not aid in resolving the controlling issues in the trial court case.[25] The court therefore declared that Central requested the court to issue an advisory opinion,[26] which is prohibited by law.[27]

Minot contended that the court should dismiss the appeal because the trial court had not decided all the issues.[28] The supreme court agreed that all claims between Central and Minot had not been resolved.[29] The court, therefore, dismissed Central's appeal[30] for failure to comply with the requirements of rule 54(b) of the North Dakota Rules of Civil Procedure.[31]

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17. 316 N.W.2d at 796 (quoting City & County of Denver v. Industrial Comm'n, 195 Colo. 431, ____, 579 P.2d 80, 82 (1978)).
18. 316 N.W.2d at 796.
19. *Id.*
20. *Id.* at 797.
21. 325 N.W.2d 243 (N.D. 1982).
22. City of Minot v. Central Ave. News, Inc., 325 N.W.2d 243, 243 (N.D. 1982). In Central's earlier appeal the supreme court answered numerous constitutional law questions before it remanded the case for further disposition. *See* City of Minot v. Central Ave. News, Inc., 308 N.W.2d 851 (N.D. 1981).
23. 325 N.W.2d at 243. *See* N.D. CENT. CODE § 40-05-17 (Supp. 1981) (city restrictions on adult establishments).
24. 325 N.W.2d at 243.
25. *Id.* at 244.
26. *Id.*
27. *Id.*
28. *Id.* at 243.
29. *Id.* at 244.
30. *Id.*
31. *Id. See* N.D. R. CIV. P. 54(b) (demand for judgment).

Dahlen v. Landis

The court considered two questions in *Dahlen v. Landis*.[32] The first was whether a jury award of $67,800 was excessive in an action for assault and battery.[33] The defendant argued that the award of $20,000 compensatory and $45,000 punitive damages was not supported by the evidence.[34] The court disagreed, stating that verdicts are excessive only if the jury acted with undue passion or prejudice, the award is without support in the record, or the award appears clearly arbitrary, unjust, or shocking to the judicial conscience.[35] The court held that the award was supportable because the record indicated that the plaintiff suffered a brutal beating, spent nine days in the hospital, and took medication to reduce his anxiety.[36]

The second question was whether a guilty plea to a related criminal charge that was dismissed could be introduced into evidence in a subsequent civil action.[37] The defendant pleaded guilty to the criminal assault charge and received a deferred imposition of sentence.[38] The sentence would expire automatically after two years if the defendant met his probation conditions.[39] When the civil action was brought, the criminal charge had expired.[40]

The defendant argued that introduction of the criminal charge violated North Dakota Century Code section 12-53-18,[41] which provides that a dismissal of a criminal charge releases the defendant from all resulting penalties and disabilities.[42] The court disagreed, stating that the legislature, in enacting the law, did not intend to obliterate a defendant's conviction for all purposes.[43] The court held that this was clear because North Dakota Century Code

32. 314 N.W.2d 63 (N.D. 1981).
33. Dahlen v. Landis, 314 N.W.2d 63, 67 (N.D. 1981).
34. *Id.* The plaintiff also was awarded $2,800 in special damages. *Id.*
35. *Id.*
36. *Id.* at 68.
37. *Id.* at 72.
38. *Id.*
39. *Id.*
40. *Id.*
41. *See* N.D. CENT. CODE § 12-53-18 (1974). Section 12-53-18 provides in part:

> Every defendant who has fulfilled the conditions of his probation . . . may at any time be permitted in the discretion of the court to withdraw his plea of guilty. The court may . . . set aside the verdict of guilty . . . against such defendant, who shall then be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted.

Id.
42. 314 N.W.2d at 72.
43. *Id.*

section 12-53-19[44] expressly provides that "the prior conviction, even though it has been dismissed, may be used in any subsequent prosecution."[45] The court concluded that section 12-53-19 did not constitute an exclusive exception.[46]

Schwartz v. Ghaly

In *Schwartz v. Ghaly*[47] the supreme court addressed whether the district court abused its discretion by permitting expert witnesses to testify on matters not disclosed in answers to interrogatories regarding the substance of their testimony.[48] Another question confronting the court was the propriety of the district court's refusal to instruct the jury that the admitting physician had a nondelegable duty to follow a patient's course of treatment during the patient's entire stay in the hospital.[49] The issues arose pursuant to an action for medical malpractice.[50]

The plaintiff contended that the administering physicians negligently allowed surgery to continue after Schwartz suffered a cardiac and respiratory arrest.[51] The district court concluded that the witnesses fully complied with the provisions of rule 26(b) (4) (A) (i) of the North Dakota Rules of Civil Procedure[52] because their testimony resulted in no surprise or prejudice to the opposing counsel.[53]

The supreme court affirmed the district court's decision, declaring that the district court did not abuse its authority in admitting the testimony of the expert witnesses.[54] The supreme court noted that it could not supervise a trial judge's discretionary decisions with the scrutiny necessary to afford the defendant a perfect trial.[55] The court further noted that the district court did not

44. *See* N.D. CENT. CODE § 12-53-19 (1974).
45. 314 N.W.2d at 72-73.
46. *Id.* at 73.
47. 318 N.W.2d 294 (N.D. 1982).
48. Schwartz v. Ghaly, 318 N.W.2d 294, 296 (N.D. 1982).
49. *Id.* at 300.
50. *Id.* at 295.
51. *Id.*
52. *See* N.D.R. CIV. P. 26(b) (4) (A) (i). This rule provides:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

Id.

53. 318 N.W.2d at 298. The supreme court supported its finding of no surprise by citing part of the trial court's memorandum opinion. *Id.* at 298 n.4.
54. *Id.* at 299.
55. *Id.* at 300.

commit reversible error when it denied the motion either to exclude the testimony of one expert witness or to postpone the trial.[56] The court concluded that the district court did not err in refusing the plaintiff's jury instruction regarding the duty of a surgeon because an erroneous or insufficient instruction is obviated if the instructions as a whole advise the jury about the law that governs the essential issues of the case.[57]

Tkach v. American Sportsman, Inc.

In *Tkach v. American Sportsman, Inc.*[58] the court addressed whether an appellee who fails to cross-appeal may raise the issues that the trial court resolved adversely to him to support the judgment.[59] The appellee brought an action against the appellant to recover unpaid rent, and the appellant counterclaimed for business losses.[60] After overruling the appellee's objections based on the parol evidence rule, the trial court heard evidence of an alleged oral agreement and awarded the appellant a counterclaim, which reduced the judgment in favor of the appellee.[61] On appeal, the appellee attempted to support his judgment by alleging that the trial court erred in admitting evidence of an oral agreement.[62]

The supreme court recognized that in *Judson PTO v. New Salem School Board*[63] it indicated that an appellee who fails to cross-appeal may not raise the issues that the trial court resolved adversely to him to support the judgment.[64] The court, however, distinguished the *Judson PTO* decision on two grounds.[65] First, in *Judson PTO* the appellee had not properly raised the supportive issue in the trial court.[66] Second, the court's discussion of the necessity of a cross-appeal was merely dicta.[67] Therefore, the court followed instead the rule that an appellee who has failed to cross-appeal may seek affirmance of the judgment on the grounds rejected by the trial court,[68] but the appellee may not seek a more favorable result on

56. *Id.* The court stated that plaintiff's counsel should have forseen the nature of the expert's testimony. *Id.* at 299 n.5.
57. *Id.* at 301.
58. 316 N.W.2d 785 (N.D. 1982).
59. Tkach v. American Sportsman, Inc., 316 N.W.2d 785, 787 (N.D. 1982).
60. *Id.* at 786.
61. *Id.*
62. *Id.* at 787.
63. 262 N.W.2d 502 (N.D. 1978).
64. 316 N.W.2d at 787 (citing Judson PTO v. New Salem School Bd., 262 N.W.2d 502, 505 (N.D. 1978)).
65. 316 N.W.2d at 787.
66. *Id.*
67. *Id.*
68. *Id.*

appeal than he received in the trial court.[69] Accordingly, the court refused to reverse that part of the judgment granting appellant's counterclaim, even though the supreme court concluded that the trial court erred in admitting evidence of an oral agreement.[70]

CONSTITUTIONAL LAW

Anderson v. H.M.

In *Anderson v. H.M.*,[71] a case of first impression, the supreme court affirmed the decision of the district court, juvenile division.[72] The parents appealed the order of the juvenile division that confirmed the juvenile referee's finding that their child was a deprived child and the recommendation that legal custody of the child be placed in the county social service director.[73] A temporary custody order pursuant to section 27-20-06(1)(h) of the North Dakota Century Code[74] was issued January 26, 1981, by the juvenile supervisor removing the child from the parents' custody.[75] A petition was then filed, alleging that the child was a deprived child.[76] These actions were based on several incidents of alleged child abuse and violence in the home.[77] A hearing was set on the deprivation petition for February 25, 1981, a guardian ad litem was appointed, and the parents were summoned for the hearing and notified of their right to counsel.[78]

The parents claimed that section 27-20-17(2) of the North Dakota Century Code[79] requires an informal hearing within

69. *Id.* (referring to Baukol-Noonan, Inc. v. Bargmann, 283 N.W.2d 158, 166 (N.D. 1979) (appellee who fails to cross-appeal may not raise the issues that the trial court resolved adversely to him to support the judgment)).

70. 316 N.W.2d at 788.

71. 317 N.W.2d 394 (N.D. 1982).

72. Anderson v. H.M., 317 N.W.2d 394, 395 (N.D. 1982).

73. *Id.*

74. *See* N.D. CENT. CODE § 27-20-06(1)(h) (Supp. 1981). Section 27-20-06(1)(h) provides:

> 1. For the purpose of carrying out the objectives and purposes of this chapter and subject to the limitations of this chapter or imposed by the court, a juvenile supervisor shall:
>
> . . . .
>
> h. Make such temporary order not to exceed thirty days for the custody and control of a deprived child as he may deem appropriate.

Id.

75. 317 N.W.2d at 396.

76. *Id.*

77. *Id.* at 395-96.

78. *Id.* at 396.

79. *See* N.D. CENT. CODE § 27-20-17(2) (1974). Section 27-20-17(2) provides:

> If he [the child] is not so released, a petition under section 27-20-21 shall be promptly made and presented to the court. An informal detention hearing shall be held

ninety-six hours of detention and that section 27-20-22(1) of the North Dakota Century Code[80] requires a hearing on the petition within ten days of filing.[81] In the alternative, the parents argued that the due process clause of the fourteenth amendment to the United States Constitution[82] requires such notice and hearing.[83] The supreme court held that, under the statutory scheme of chapter 27-20 of the North Dakota Century Code,[84] when a juvenile supervisor issues a temporary custody order under section 27-20-06(1)(h),[85] the hearing and notice requirements of sections 27-20-17(2)[86] and 27-20-22(1)[87] are not required.[88]

The court, however, held that the due process clause[89] requires, at a minimum, an informal hearing on the temporary custody order once the child has been removed from the home because a thirty-day removal from parental custody without a hearing is unreasonable interference with fundamental parental

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promptly and not later than ninety-six hours after he is placed in detention to determine whether his detention or shelter care is required under section 27-20-14. Reasonable notice thereof, either oral or written, stating the time, place, and purpose of the detention hearing shall be given to the child and if they can be found, to his parents, guardian, or other custodian. Prior to the commencement of the hearing, the court shall inform the parties of their right to counsel and to appointed counsel if they are needy persons, and of the child's right to remain silent with respect to any allegations of delinquency or unruly conduct.

Id.

80. *See* N.D. CENT. CODE § 27-20-22(1) (Supp. 1981). This section provides in part:

After the petition has been filed, the court shall fix a time for hearing thereon, which shall not be later than thirty days after the filing of the petition. If the child is in detention, the time for the hearing shall not be later than ten days after the filing of the petition. The court may extend the time for hearing for good cause shown. The court shall direct the issuance of a summons to the parents, guardian, or other custodian, a guardian ad litem, and any other persons as appear to the court to be proper or necessary parties to the proceeding, requiring them to appear before the court at the time fixed to answer the allegations of the petition.

Id.

81. 317 N.W.2d at 397.

82. *See* U.S. CONST. amend. XIV, § 1 (no state shall "deprive any person of life, liberty, or property, without due process of law").

83. 317 N.W.2d at 397.

84. *See* N.D. CENT. CODE ch. 27-20 (1974 & Supp. 1981) (Uniform Juvenile Court Act as enacted and amended by the North Dakota Legislature). The *Anderson* court referred to a Georgia decision in which the Georgia Supreme Court discussed its version of the Uniform Juvenile Court Act. 317 N.W.2d at 398 (discussing Sanchez v. Walker County Dept. of Family & Children Servs., 237 Ga. 406, 229 S.E.2d 66 (1976)). The Georgia Supreme Court decided, under facts similar to *Anderson,* that Georgia's provisions for detention and deprivation hearings applied. 317 N.W.2d at 399. Georgia, however, had not enacted a provision comparable to North Dakota Century Code § 27-20-06(1)(h), which gives a juvenile supervisor authority to issue temporary custody orders. *Id.* at 398. Therefore, the North Dakota Supreme Court distinguished *Anderson* and decided that this statute, as a later amendment by addition, superceded and excluded the statutory hearing requirements of North Dakota Century Code § 27-20-17(2) and § 27-20-22(1). *Id.*

85. For the text of North Dakota Century Code § 27-20-06(1)(h), see *supra* note 74.

86. For the text of North Dakota Century Code § 27-20-17(2), see *supra* note 79.

87. For the text of North Dakota Century Code § 27-20-22(1), see *supra* note 80.

88. 317 N.W.2d at 399-400. The court limited its holding to the situation stated in the statute — a hearing is not required by the statutory scheme only when the basis of the temporary custody order is that the child is a deprived child. *Id.*

89. *See* U.S. CONST. amend. XIV, § 1.

rights.[90] The court stated that due process requires that an informal hearing must be held promptly, but not later than ninety-six hours after temporary custody begins; the child must be released unless it is shown that reasonable grounds exist to believe that custody is required to protect the child; reasonable notice must be given the child and the parents, guardian, or other custodian stating the time, place, and purpose of the hearing; notice must be given of the right to counsel with counsel being appointed if the parties qualify; and if, after the hearing, custody is retained, a petition alleging deprivation must be filed and a hearing must be held prior to expiration of the temporary custody order.[91]

Phoenix Assurance Co. of Canada v. Runck

In *Phoenix Assurance Co. of Canada v. Runck*[92] the supreme court upheld a district court ruling that the fifth amendment privilege does not apply to possible foreign prosecution.[93] Defendants in an insurance fraud action sought a protective order for the use of a grand jury transcript based on the fifth amendment privilege.[94] Defendants asserted that the district court erred in denying them the right to plead the fifth amendment regarding their possible prosecution for arson in Canada.[95]

In determining whether the fifth amendment applies to foreign prosecution, the supreme court looked to *In re Parker*.[96] The *Parker* court noted that "[t]he fifth amendment was intended to protect against self-incrimination for crimes committed against the United States and the several states but need not and should not be interpreted as applying to acts made criminal by the laws of a foreign nation."[97] The supreme court also considered the history of the fifth amendment to determine its meaning.[98] Noting the absence in the fifth amendment provision of any reference to foreign law, the court determined that the fifth amendment "was

90. 317 N.W.2d at 400-01.

91. *Id.* at 401-02. The court reasoned that the requirements of due process parallel the requirements of North Dakota Century Code § 27-20-17(2) and § 27-20-22(1) except that the time period for a hearing on the deprivation petition is not dependent upon whether the child is in detention as it is under the statute. *Id.* at 401.

92. 317 N.W.2d 402 (N.D. 1982).

93. Phoenix Assurance Co. of Canada v. Runck, 317 N.W.2d 402, 411 (N.D. 1982).

94. *Id.* at 406. The fifth amendment provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

95. 317 N.W.2d at 408. The court stated that arson is a crime under Canadian law and is an extraditable offense under the extradition treaty between the United States and Canada. *Id.*

96. *Id.* at 409 (referring to *In Re* Parker, 411 F.2d 1067 (10th Cir. 1969), *vacated as moot sub nom.* Parker v. United States, 397 U.S. 96 (1970) (question of the relationship between the fifth amendment and foreign prosecution was moot in this case)).

97. 317 N.W.2d at 407, 409 (quoting *In Re* Parker, 411 F.2d at 1070).

98. 317 N.W.2d at 411.

designed to apply only to the laws of the United States and was not intended to embrace foreign prosecution."[99]

State v. Rippley

In *State v. Rippley*[100] the defendant appealed his conviction for delivery of a controlled substance, alleging that absence of a culpability requirement in North Dakota Century Code section 19-03.1-23(1)[101] resulted in an unconstitutional application of the statute.[102] The defendant argued that the section could subject innocent persons to convictions for delivery of controlled substances in North Dakota.[103] Holding that the statute was constitutional, the supreme court relied on *State v. McDowell.*[104] The *McDowell* decision upheld strict liability for issuing a check without an account or with insufficient funds.[105] The *Rippley* court determined that the legislature intended the controlled substances provision to contain no culpability requirement because there was no express language in the statute and because in 1975 the legislature removed from the statute the terms "knowingly or intentionally."[106] The court therefore concluded that the section defines a strict liability offense.[107]

CRIMINAL LAW AND PROCEDURE

State v. Allery

In *State v. Allery*[108] the supreme court ruled that obvious error occurred at trial because the State used as substantive evidence a prior inconsistent statement not given under oath, because the trial court did not instruct the jury to limit its consideration of the prior inconsistent statement to impeachment purposes only, and because

99. *Id.*

100. 319 N.W.2d 129 (N.D. 1982).

101. *See* N.D. CENT. CODE § 19-03.1-23(1) (1981). The statute provides: "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." *Id.*

102. State v. Rippley, 319 N.W.2d 129, 130 (N.D. 1982).

103. *Id.* Rippley argued that the statute would apply to a postman delivering a controlled substance. *Id.*

104. *Id.* at 133. *See* State v. McDowell, 312 N.W.2d 301 (N.D. 1981).

105. State v. McDowell, 312 N.W.2d 301, 306 (N.D. 1981) (legislature may lawfully enact a law that does not have a culpability requirement and that still provides criminal penalties).

106. 319 N.W.2d at 133. The court reasoned as follows: "Whether or not § 19-03.1-23(1) is a strict liability offense is a question of legislative intent to be determined by the language of the Act in connection with its manifest purpose and design." *Id.* (citing State v. Nagel, 279 N.W.2d 911, 915 (S.D. 1979) (strict liability offense determined by examining legislative intent and the language and purpose of a statute)).

107. 319 N.W.2d at 133.

108. 322 N.W.2d 228 (N.D. 1982).

the trial court admitted into evidence statements approaching improper conduct on the defendant's right to remain silent.[109] Allery was convicted of theft of property, namely cattle, worth more than three hundred dollars.[110] The State's evidence implicating Allery in the theft was mostly circumstantial.[111] The son of Allery's wife, Barry DeCoteau, testified at trial that he was present in a car with Allery when Allery drove into a pasture; however, he also testified that they did not stop.[112]

Allery appealed his conviction on the grounds that the trial court erred in admitting the testimony of two law enforcement officers.[113] Law enforcement officers testified, without objection, that DeCoteau made a prior statement that Allery shot a cow and loaded it into the trunk of the car.[114] An officer also testified, again without objection, concerning the questioning of Allery prior to trial.[115] The officer testified about Allery's evasive answers to questions concerning the cattle and that Allery "just grinned and did not reply" when asked if he wanted to say anything about the alleged thefts.[116]

The court first addressed Allery's contention that the use of the law enforcement officer's testimony about statements made by Allery during questioning was prejudicial error because the testimony was an improper comment upon his right to remain silent.[117] The court emphasized that Allery was given a *Miranda* warning prior to questioning and that the law enforcement officer's testimony was not objected to at trial.[118] The court then determined

109. State v. Allery, 322 N.W.2d 228, 232-33 (N.D. 1982).

110. *Id.* at 229. *See* N.D. CENT. CODE § 12.1-23-02 (1976).

111. 322 N.W.2d at 229. The remains of freshly butchered calves were found in a pasture near Allery's father's home. *Id.* Allery's wife's automobile, to which Allery had access, was also found in the pasture, along with a butcher knife, several other knives, and a hacksaw. *Id.* One person testified at trial that Allery offered to sell meat contained in a plastic garbage bag that emitted an odor which suggested that the meat was spoiled. *Id.* at 230. The State presented evidence that cattle hair was present on the handle of a knife found in the pasture, that cattle blood was found on paper towels at the scene, and that hair from cattle hides and blood stains were observed in the trunk of the automobile. *Id.*

112. *Id.* at 229.

113. *Id.* at 230-31.

114. *Id.* at 229.

115. *Id.* at 230. The officer testified that Allery received his *Miranda* warnings. *Id.*

116. *Id.* When confronted by the officer regardint the cattle thefts and the officer's "good information" concerning them, Allery allegedly responded, "Well, you'll have to prove it." *Id.* When questioned about how he loaded the calf, Allery allegedly laughed and stated, "Well, maybe I'm the incredible hulk." *Id.*

117. *Id.* at 230-31. The court noted that it addressed a similar contention in *State v. Schneider. Id.* at 231. *See* State v. Schneider, 270 N.W.2d 787 (N.D. 1978). In *Schneider* a police officer asked the defendant whether he was operating the motor vehicle, and the defendant responded by stating, "I will remain silent." *Id.* at 791. The officer testified at trial to the conversation and to the fact that he twice advised the defendant of his *Miranda* rights. *Id.* After considering the entire record of the case, including the fact that the defendant ultimately testified at trial that he had in fact been operating the motor vehicle, the court found that the officer's testimony was harmless error beyond a reasonable doubt. *Id.* at 793.

118. 322 N.W.2d at 231.

that although the law enforcement officer's testimony about Allery's evasive answers could not be construed itself as an improper comment upon Allery's right to remain silent, the additional testimony that Allery "grinned and did not reply" did approach an improper comment.[119] The court found, however, that the statements did not constitute grounds for reversal.[120]

The court next considered the possible use as substantive evidence of the law enforcement officers' testimony about DeCoteau's prior inconsistent statements.[121] The court stated that a prior inconsistent statement may be used as substantive evidence in a criminal case only if the prior inconsistent statement was made under oath.[122] Because the record revealed no indication that DeCoteau's prior statements were given under oath, the court concluded that the testimony concerning DeCoteau's prior inconsistent statements should not have been used as substantive evidence.[123] The testimony could only have been considered for impeachment purposes pursuant to rule 613 of the North Dakota Rules of Evidence.[124] The supreme court found error in the trial court's failure to give and counsel's failure to request an instruction limiting the use of the testimony concerning the prior inconsistent statements.[125]

In determining whether the failure to object to the testimony or give appropriate instructions was harmless error or obvious error pursuant to rule 52 of the North Dakota Rules of Criminal Procedure,[126] the court noted that "[t]he totality of circumstances may and should be taken into consideration in resolving procedural issues and admission of evidence."[127] The court also noted that even though a single item may not be sufficient to warrant a change in the disposition of a case, "the accumulation of several doubtful items in one case may be grounds for reaching a different conclusion."[128] Thus, the court concluded that because no instruction was given to limit the testimony of DeCoteau to impeachment purposes and because the remaining evidence was circumstantial, and in one respect may have approached improper comment on Allery's right to remain silent, the error regarding

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 232. *See* N.D.R. EVID. 801(d)(1)(i).
123. 322 N.W.2d at 232.
124. *Id. See* N.D.R. EVID. 613 (prior statements of witnesses).
125. 322 N.W.2d at 232.
126. *See* N.D.R. CRIM. P. 52 (harmless error and obvious error).
127. 322 N.W.2d at 232.
128. *Id.* at 233.

DeCoteau's prior inconsistent statements was so fundamental that it warranted reversal of Allery's conviction and a remand for retrial.[129]

State v. Borden

In *State v. Borden*[130] the supreme court determined that the presence of unknown quantities of marijuana and "hard" drugs in a motel room provides probable cause to believe that the drugs could be easily disposed of to support the issuance of a "no-knock" search warrant under section 19-03.1-32(3) of the North Dakota Century Code.[131] *Borden* involved the surveillance of a motel room rented by the defendants.[132] Officers noticed considerable traffic in and out of the room during a two-day period, including persons believed to be involved in local drug activity.[133] A motel security guard overheard persons occupying the room mention that they had " 'two pounds to get rid of.' "[134] Officers also examined the contents of two wastebaskets in the hallway outside the room and discovered marijuana roaches, hypodermic syringe caps, bloody facial tissues, money due slips, marijuana seeds, and a hospital receipt issued to one of the defendants.[135] With this information the officers obtained a "no-knock" warrant for the room and then unlocked the door and entered the room without giving notice.[136]

The supreme court reversed the district court decision, which granted the defendants' suppression motion.[137] The court reasoned that because the evidence indicated that the defendants were

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129. *Id.*

130. 316 N.W.2d 93 (N.D. 1982).

131. State v. Borden, 316 N.W.2d 93, 97 (N.D. 1982). *See* N.D. CENT. CODE § 19-03.1-32(3) (1981). The section provides in part:

> Any officer authorized to execute a search warrant, without notice of his authority and purpose, may break open an outer or inner door or window of a building, or any part of the building, or anything therein, if the judge or magistrate issuing the warrant has probable cause to believe that if such notice were to be given the property sought in the case may be easily and quickly destroyed or disposed of . . . and has included in the warrant a direction that the officer executing it shall not be required to give such notice.

Id.

132. 316 N.W.2d at 94.

133. *Id.* at 96.

134. *Id.* at 94. Officers also overheard discussions taking place in the defendants' room with reference to money matters and " '25 pounds.' " *Id.*

135. *Id.*

136. *Id.* at 95.

137. *Id.* at 96. The district court concluded that the magistrate did not have probable cause to believe that the property might be quickly or easily disposed of if notice were given. The district court reasoned that all the evidence suggested that the defendants had a large quantity of drugs, which would preclude quick disposal. In addition, the officers did not testify about the ease with which the evidence could have been destroyed. *Id.*

conducting drug sales in the room and were overheard mentioning that they had " 'two pounds to get rid of,' " the logical conclusion was that they had a diminishing quantity of drugs in the room.[138] In addition, the officers' discovery of bloody syringe caps in the wastebaskets indicated the presence of "hard" drugs capable of easy disposal.[139]

The court stated that the magistrate had reason to believe that unknown quantities of marijuana and "hard" drugs were present in the room and that the magistrate could "take judicial notice of the fact that drugs are easily disposed of."[140] The court concluded that the magistrate had sufficient probable cause to issue the "no-knock" search warrant.[141]

State v. Cox

In *State v. Cox*[142] defendant Cox appealed a bench trial conviction of theft of property.[143] Cox alleged two points of error: that the trial court judge erred in limiting defense counsel's cross-examination[144] and that there was insufficient evidence for the trial court to find Cox guilty of theft of property under section 12.1-23-02 of the North Dakota Century Code.[145]

With respect to the cross-examination issue, the supreme court applied the rule of *State v. Rindy,*[146] which held that the scope of cross-examination is within the sound discretion of the court and will "not be disturbed on appeal absent an abuse of discretion."[147] The *Cox* court found that the trial court's limitation of cross-examination based upon relevancy of evidence was "clearly [a]

138. *Id.* at 97.

139. *Id.*

140. *Id.* In *State v. Loucks* the court previously held that because a magistrate may take judicial notice of the fact that drugs may be easily disposed of, it is not essential for the officer requesting a "no-knock" search warrant to specifically state in his affidavit or testimony that it is probable that the giving of notice will result in the destruction or disposal of drugs. *Id.* (referring to State v. Loucks, 209 N.W.2d 772, 777-78 (N.D. 1973)).

141. 316 N.W.2d at 97.

142. 325 N.W.2d 181 (N.D. 1982). Cox was convicted of theft of property in violation of § 12.1-23-02 of the North Dakota Century Code. State v. Cox, 325 N.W.2d 181, 182 (N.D. 1982). *See* N.D. CENT. CODE § 12.1-23-02 (Supp. 1981). The violation occurred as a result of a transaction involving a trade of two vehicles. Cox argued that he only loaned a vehicle to Joe Wetch. Wetch claimed the two traded vehicles as evidenced by an exchange of titles. 325 N.W.2d at 182.

Cox delivered a vehicle to Wetch, who sold it to Mitchussen. Mitchussen reported the vehicle stolen on December 1, 1981. The vehicle later was recovered from Cox who admitted taking it. *Id.*

143. 325 N.W.2d at 182.

144. *Id.* Counsel for defendant Cox, during cross-examination of Wetch, inquired whether Wetch had complied with statutory requirements for transfer of motor vehicle titles. The State objected, and the court sustained an objection on the ground of irrelevancy. *Id.*

145. *Id. See* N.D. CENT. CODE § 12.1-23-02 (Supp. 1981) (State must prove that the defendant knowingly took or exercised "unauthorized control over . . . the property of another with intent to deprive the owner thereof").

146. 299 N.W.2d 783 (N.D. 1980).

147. 325 N.W.2d at 182 (citing State v. Rindy, 299 N.W.2d 783 (N.D. 1980)).

valid exercise of its discretionary power."[148] The court held, therefore, that the trial court committed no error by limiting the scope of cross-examination.[149] The court further noted that the defendant was only limited in questioning and was not completely foreclosed from questioning the credibility of the witness.[150]

The supreme court also considered the defendant's second allegation of error at trial,[151] whether there was sufficient evidence for finding that he committed theft of property.[152] Cox argued that there was insufficient evidence to find that he "took or exercised unauthorized control over the property of another."[153] He believed that because title to the automobile was in his name the property could not belong to another.[154]

Citing section 12.1-23-10 of the North Dakota Century Code, the supreme court noted that " 'property of another' " within the meaning of the statute may include property in which the actor himself has an interest.[155] Therefore, the court held that "the fact that one person has title to property does not preclude the property from being property of another person."[156] The court thus affirmed the conviction.[157]

State v. Dilger

In *State v. Dilger*[158] the State appealed, pursuant to North Dakota Century Code section 29-28-07(5),[159] from a district court's order suppressing three photographs in a pending murder trial.[160]

148. 325 N.W.2d at 182.

149. *Id.* at 183.

150. *Id.* at 182-83. The record showed that defense counsel was permitted to show that Wetch was not a licensed auto dealer and that counsel was able to inquire whether Wetch intended to transfer title for the vehicle to Mitchussen within 15 days. *Id.*

151. *Id.* at 183.

152. *Id.*

153. *Id.*

154. *Id.* Cox had delivered the title to Wetch, but had not "signed over" the title. *Id.* at 182 n.1.

155. *Id.* at 183. The trial court concluded that Wetch owned the vehicle taken by Cox. *Id.*

156. *Id.*

157. *Id.* at 184. The court noted that it looks only to "evidence most favorable to the verdict and the reasonable inferences therefrom" when deciding whether "substantial evidence to support the conviction" exists. *Id.* (citing State v. Olson, 290 N.W.2d 664 (N.D. 1980)).

158. 322 N.W.2d 461 (N.D. 1982).

159. *See* N.D. CENT. CODE § 29-28-07(5) (Supp. 1981). Section 29-28-07 provides in part:

> An appeal may be taken by the state from:
>
> . . . .
>
> 5. An order . . . suppressing evidence . . . when accompanied by a statement of the prosecuting attorney asserting that the deprivation of the use of the property ordered to be . . . suppressed . . . has rendered the proof available to the state with respect to the criminal charge filed with the court, (1) insufficient as a matter of law, or (2) so weak in its entirety that any possibility of prosecuting such charge to a conviction has been effectively destroyed.

Id.

160. State v. Dilger, 322 N.W.2d 461, 462 (N.D. 1982).

Appellee Dilger questioned the State's authority to appeal and raised the issue of the extent to which the prosecuting attorney must support his statement that the suppression order has effectively destroyed the State's case.[161]

In dismissing the State's appeal, the supreme court noted that section 29-28-07(5) requires " 'a statement of the prosecuting attorney asserting that the deprivation of the use of the [suppressed evidence] . . . has rendered the proof available to the state with respect to the criminal charges filed with the court' " inadequate.[162] The court noted that the available proof must be " '(1) *insufficient as a matter of law,* or (2) *so weak in its entirety that any possibility of prosecuting such charge to conviction has been effectively destroyed.*' "[163] The court held that an appeal taken by the prosecuting attorney pursuant to section 29-28-07(5) must be more than a mere recitation of the statutory language.[164] Such an appeal should in addition "provide this court with an explanation, not inconsistent with the record, stating the reasons why the trial court's order has effectively destroyed any possibility of prosecuting the criminal charge to a conviction."[165] The prosecution's explanation may, but need not be based upon the record and should be included either with the statement required by section 29-28-07(5) or in the prosecution's brief filed for purposes of the appeal.[166]

The court, in reviewing the prosecutor's statement, will give the "utmost deference" to the prosecutor's judgment in evaluating the remaining proof.[167] Moreover, the court stated that it would be reluctant to dismiss the State's appeal "unless the prosecution's determination of the need for the suppressed evidence is clearly inconsistent with the record or is without foundation in reason or logic."[168]

State v. Heger

At issue in *State v. Heger*[169] was the defendant's mental competence to stand trial.[170] The district court, after hearing expert medical testimony from both sides and conducting its own informal

161. *Id.* at 462-63.
162. *Id.* at 462 (quoting N.D. CENT. CODE § 29-28-07(5)).
163. 322 N.W.2d at 462 (quoting N.D. CENT. CODE § 29-28-07(5)) (emphasis in original).
164. 322 N.W.2d at 463.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. 326 N.W.2d 855 (N.D. 1982).
170. State v. Heger, 326 N.W.2d 855, 856 (N.D. 1982).

examination of the defendant, found that the defendant was competent to stand trial.[171] The defendant was tried and convicted of murder, gross sexual imposition, and burglary.[172] The sole issue on appeal was whether the district court erred in finding the defendant competent to stand trial.[173]

In affirming the district court's finding of competence,[174] the supreme court established that the prosecution has the burden of proof by a preponderance of the evidence on the issue of competence.[175] The court also stated that its review of a trial court's determination of competence is governed by the "clearly erroneous" standard.[176]

State v. Knoefler

In *State v. Knoefler*[177] the supreme court held that defense counsel's inability to acquire an expert witness because of a conflict in dates did not constitute "good cause shown" to warrant continuance of the trial.[178] The action arose because the defendant operated beehives without a license[179] and violated the state's two-mile spacing requirement for beehives.[180] Following his arrest, the defendant retained two attorneys, one from California and one from North Dakota.[181] Because of a misunderstanding, neither attorney contacted an expert witness until it was too late to obtain a witness for trial.[182] The trial court refused to grant a continuance after defendant's counsel submitted an affidavit to the court verifying what the expert's testimony would have been.[183] The North Dakota Supreme Court held that the defendant had at least one counsel who was effective and affirmed the denial of a continuance.[184]

The court affirmed its ruling in a related case when it

171. *Id.* at 857.
172. *Id.* at 856.
173. *Id.*
174. *Id.* at 861.
175. *Id.* at 858.
176. *Id.*
177. 325 N.W.2d 192 (N.D. 1982).
178. State v. Knoefler, 325 N.W.2d 192, 194 (N.D. 1982).
179. *Id.* at 194. *See* N.D. CENT. CODE § 4-12-03 (Supp. 1981) (establishes licensing requirements necessary for valid operation of beehives within the State of North Dakota).
180. 325 N.W.2d at 194. *See* N.D. CENT. CODE § 4-12-03.1 (Supp. 1981). This section provides: "No new commercial location may be established within two miles [3.22 kilometers] of another commercial location. No commercial operator may establish an apiary within two miles [3.22 kilometers] of another commercial operator. The noncommercial beekeeper with one to twenty-four colonies will have territorial rights on one location." *Id.*
181. 325 N.W.2d at 194.
182. *Id.*
183. *Id.* at 196.
184. *Id.* at 199-200.

concluded that the two-mile spacing requirement was rationally related to the prevention of honey raiding and the spread of bee diseases.[185] The court stated that the defendant could not benefit from the argument that the statute should be more restrictive to accomplish its stated purpose.[186] Finally, the court concluded that the defendant could not benefit from a claim of discriminatory prosecution when the defendant intentionally confronted the law to challenge the constitutional validity of the statute.[187]

State v. Manke

In *State v. Manke*[188] the supreme court considered whether the State in a criminal prosecution could use the public records exception[189] to the hearsay rule[190] to gain admission into evidence of a laboratory report when the chemist making the report was available for cross-examination.[191] The State sought to introduce the laboratory report after it was unable to call the chemist due to the State's failure, within the prescribed time limits, to endorse the chemist as a witness.[192] The trial court admitted the "rape kit" report into evidence,[193] and the defendant was convicted.[194] On appeal, the defendant argued that the report was inadmissible hearsay.[195]

The supreme court ruled that the report was admissible under the spirit of rule 803(8) of the North Dakota Rules of Evidence.[196] The language of the rule, however, explicitly limits its applicability to public records or reports when used in civil actions or against the State in criminal proceedings.[197] The court nevertheless stated that admitting the laboratory report was consistent with the assumption that reports of public officials possess adequate indicia of trustworthiness and reliability if certain factors are present such as timeliness of investigation, special skills, and no improper motive.[198]

185. *Id.* at 195 (affirming State v. Knoefler, 279 N.W.2d 658 (N.D. 1979)). The court stated that it is for the legislature and not the courts to determine proper spacing regulations. 325 N.W.2d at 196.
186. 325 N.W.2d at 196.
187. *Id.* at 198.
188. 328 N.W.2d 799 (N.D. 1982).
189. *See* N.D.R. EVID. 803(8) (hearsay exception for public records and reports).
190. *See* N.D.R. EVID. 801(c) (hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").
191. State v. Manke, 328 N.W.2d 799, 800 (N.D. 1982).
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 804-05.
197. *Id.* at 803. *See* N.D.R. EVID. 803(8).
198. 328 N.W.2d at 803.

The court stated that the reason for limiting the application of rule 803(8) is that allowing into evidence evaluative reports of public officials against an accused in a criminal case would violate his right to confront witnesses against him.[199] Because the chemist was available to testify, the admission of the report did not violate the defendant's right to confront the witness against him.[200]

State v. Marinucci

In *State v. Marinucci*[201] the supreme court held that the trial court did not err in refusing to give a jury instruction pertaining to acts that may not be enjoined or restrained during a labor dispute;[202] that a statute authorizing payment of reasonable costs of prosecution as a sentencing alternative is constitutional;[203] and that the evidence sustained the conviction of defendant Marinucci for criminal coercion.[204] The appeal stemmed from an incident occurring during a strike of the Steiger Tractor Corporation plant in Fargo, North Dakota.[205]

The defendant was convicted of criminal coercion for threatening to damage the vehicle of an over-the-road truck driver who crossed the Steiger picket line.[206] Defendant argued that he was denied due process of law when the trial court failed to give a requested instruction, which provided that his conduct as an employee on strike was not illegal and could not be judicially restrained.[207] The supreme court noted that a trial court may refuse to submit an inapplicable or irrelevant instruction to the jury.[208] The supreme court found that the jury was instructed on the elements of the crime and that the defendant had a right to exercise his freedom of speech by discussing the facts of the labor dispute, absent a violation of the law.[209] The court held that the trial court's instruction correctly and adequately dealt with the defendant's rights.[210]

The supreme court found that the testimony of a trucker and a

199. *Id.* at 803-04. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.").
200. 328 N.W.2d at 804.
201. 321 N.W.2d 462 (N.D. 1982).
202. State v. Marinucci, 321 N.W.2d 462, 466 (N.D. 1982).
203. *Id.* at 467.
204. *Id.* at 468.
205. *Id.* at 463.
206. *Id.*
207. *Id.* at 464. The requested instruction would have stated that the defendant could not be restrained from giving publicity to the strike. *Id.* at 465.
208. *Id.* (citing State v. Granrud, 301 N.W.2d 398 (N.D.), *cert. denied,* 454 U.S. 825 (1981)).
209. 321 N.W.2d at 465-66.
210. *Id.* at 466.

dispatcher with whom the defendant spoke was sufficient to support an inference that the statements made by the defendant resulted in a threat.[211] The court noted that circumstantial evidence may justify a conviction provided it is of sufficient probative force to enable a jury to find guilt beyond a reasonable doubt.[212] The court stated that it will review the evidence to determine whether the evidence is competent to warrant a conviction.[213] The court held that the testimony of the truck driver and his employer was sufficient to meet the competence test and, therefore, to allow the jury to infer that the defendant's statements constituted a threat.[214]

The defendant argued that the statute[215] allowing costs as an alternative to sentencing had a chilling effect on his right to a trial.[216] The court held that the defendant failed to advance a reason that would overcome the presumption of constitutionality of the statute.[217]

State v. McCabe

In *State v. McCabe*[218] defendant McCabe, along with two others, used a stolen credit card to purchase goods at a Bismarck Holiday Inn.[219] A cashier at the Holiday Inn became suspicious of the defendant and closely observed him.[220] After his purchase, the cashier called Mastercharge and learned that the credit card was stolen.[221] The cashier immediately contacted the Bismarck Police and she, along with one other clerk, gave the police a fairly complete description of the defendant.[222] An individual at the Holiday Inn informed police officers where they could find the defendant.[223] The police went to the address, found a man closely fitting the description given by the cashier, and made a warrantless arrest of McCabe.[224] The police took McCabe to the police station

211. *Id.* The defendant stated the following to the transportation dispatcher: " 'Got a bunch of angry guys out here and I don't know if I can handle them all. Something could happen to your truck, trailer, don't forget we're an international union.' " *Id.* at 464. The trucker testified that the defendant's statements frightened him. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *See* N.D. CENT. CODE § 12.1-32-02(1)(a) (1976) (State must prove that the defendant intentionally compelled another person to commit a crime).

216. 321 N.W.2d at 466. The trial court required the defendant to pay $600 in court costs. *Id.*

217. *Id.* The court stated that a statute is presumptively constitutional unless it is clearly shown to contravene the state or federal constitution. *Id.* (citing Dorgan v. Kouba, 274 N.W.2d 167 (N.D. 1978)).

218. 315 N.W.2d 672 (N.D. 1982).

219. State v. McCabe, 315 N.W.2d 672, 674 (N.D. 1982).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

and photographed him.[225] The police then showed this photograph along with five others of similar description to the cashier. She immediately identified McCabe's photograph.[226]

McCabe was subsequently charged with forgery, a class A misdemeanor.[227] McCabe sought to suppress any evidence of photographic identification and any evidence of in court identification.[228] McCabe argued that the arrest was invalid because it was a warrantless arrest for a misdemeanor not committed in the presence of the officer.[229] The trial court granted the motion.[230] The State appealed two issues: .whether the arrest was invalid and whether the court erred in prohibiting in court identification of McCabe.[231]

Section 29-06-15(4)[232] of the North Dakota Century Code discusses warrantless arrests. In *State v. Willms*[233] the supreme court interpreted the statute, finding that a "charge," within the meaning of the statute, could be an oral charge made to a police officer.[234] In *McCabe* there was an oral charge made to the officers by the cashier.[235] The supreme court also stated that the inherent value of a credit card is more than one hundred dollars.[236] Theft of a credit card would thus constitute a felony.[237] The arrest was therefore valid.[238]

The court determined that because the arrest was valid, any evidence coming from the arrest was admissible.[239] The court, however, analyzed the next issue assuming an invalid[240] arrest: whether the court erred in suppressing the witness' in court identification of the defendant.[241]

Evidence need not be excluded as fruit of the poisonous tree if it is attributed to an independent source.[242] When a witness had an opportunity to closely observe a defendant and identified the

225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at 675.
229. *Id.*
230. *Id.*
231. *Id.*
232. *See* N.D. CENT. CODE § 29-06-15(4)(d) (Supp. 1981). Section 29-06-15(4) states that "[a] peace officer, without a warrant, may arrest a person . . . [o]n a charge, made upon reasonable cause, of the commission of a felony by the party arrested." *Id.*
233. 117 N.W.2d 84 (N.D. 1962).
234. State v. Willms, 117 N.W.2d 84, 87 (N.D. 1962).
235. 315 N.W.2d at 676.
236. *Id.*
237. *Id. See* N.D. CENT. CODE § 12.1-23-05 (Supp. 1981) (theft grading); *id.* § 12.1-23-02(3) (possession of stolen property).
238. 315 N.W.2d at 676.
239. *Id.*
240. *Id.* at 677.
241. *Id.*
242. *Id.* at 678.

defendant to the police a short time later, a court may believe that the witness' in court identification of the defendant was not based on a pretrial viewing of the defendant, but rather on an independent source.[243] Here the cashier closely observed the defendant during the commission of the crime.[244] She then gave the police a fairly complete description of the defendant.[245] She later identified the defendant's photograph from a group of six similar photographs.[246] The court, therefore, concluded that any in court identification of the defendant, even if there had been an invalid arrest, would have been properly admitted under the independent source doctrine.[247]

State v. Mondo

In *State v. Mondo*[248] the supreme court held that to support an application for a search warrant a magistrate may consider a contemporaneously filed affidavit that supports an application for an arrest warrant.[249] The *Mondo* decision represents a clear statement by the court that a magistrate is not bound to information contained solely within the "four corners" of the affidavit to determine the existence of probable cause.[250]

In *Mondo* a police officer sought both an arrest warrant and a search warrant based upon information received from the alleged victim that she had been raped by the defendant and that she had seen marijuana at the defendant's apartment.[251] The officer's affidavit in support of the application for a search warrant failed to state the time or date of the alleged sexual offense.[252] This necessary information was present, however, in a contemporaneously filed affidavit in support of an arrest warrant.[253]

The court reiterated its view that "a reviewing court will pay

243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. 325 N.W.2d 201 (N.D. 1982).
249. State v. Mondo, 325 N.W.2d 201, 204 (N.D. 1982).
250. *Id.* The court briefly discussed the extent of the evolution in North Dakota of the "four corners" issue by stating that its earlier decision in *State v. Klosterman* strongly implied that sworn evidence apart from the affidavit may assist in establishing probable cause for the issuance of a search warrant. *Id. See* State v. Klosterman, 317 N.W.2d 796 (N.D. 1982). The court also noted that rule 41(c)(1) of the North Dakota Rules of Criminal Procedure explicitly authorizes issuance of warrants upon information from more than one affidavit. 325 N.W.2d at 204. *See* N.D.R. CRIM. P. 41(c)(1).
251. 325 N.W.2d at 202.
252. *Id.* The court determined that the failure of the affidavit to state the time or date of the alleged sexual offense rendered the affidavit insufficient to establish probable cause because "probable cause to search depends upon whether or not evidence of criminal activity is presently located at some particular place." *Id.* at 203.
253. *Id.* at 202-03.

'substantial deference to judicial determinations of probable cause' when the magistrate is 'neutral and detached.' "[254] The court emphasized that a reviewing court's primary concern is that the magistrate is sufficiently informed to make an independent determination of probable cause.[255]

The court held that the information contained in the separate affidavit for the arrest warrant sufficiently informed the magistrate of all facts necessary to issue a search warrant.[256] The magistrate was thus able to make an independent determination that the police officer would find evidence of the alleged sexual offense and evidence of unlawful possession of marijuana in the defendant's apartment.[257]

State v. Puhr

In *State v. Puhr*[258] the supreme court held that evidence obtained from the defendant's breathalyzer test was admissible despite the fact that the test was not performed according to the method approved by the state toxicologist.[259] The method approved by the state toxicologist requires that the operator ascertain that the subject has had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample.[260] In *Puhr* the defendant was under arrest for a maximum of eighteen minutes before the test was administered.[261] The state toxicologist testified at trial, however, that the test results were accurate if the subject had nothing to eat, drink, or smoke within ten or twelve minutes.[262]

Relying upon *State v. Schneider,*[263] the court reasoned that the testimony of the state toxicologist at trial took precedence over the "approved method."[264] The court concluded that the State satisfied the foundational requirement of proving that the breathalyzer test was "fairly administered" as required by statute.[265]

254. *Id.* at 204.
255. *Id.*
256. *Id.*
257. *Id.* The defendant also argued that because the warrant for arrest did not specify the alleged victim's name, the magistrate could not infer that the arrest warrant referred to the same sexual offense as the affidavit for the search warrant. *Id.* at 204-05. The court rejected this argument stating that a reviewing court should not make a "hypertechnical" examination of the information available to the magistrate. *Id.* at 205.
258. 316 N.W.2d 75 (N.D. 1982).
259. State v. Puhr, 316 N.W.2d 75, 77-78 (N.D. 1982).
260. *Id.* at 76.
261. *Id.* at 76-77.
262. *Id.* at 77.
263. 270 N.W.2d 787 (N.D. 1978).
264. 316 N.W.2d at 77.
265. *Id. See* N.D. CENT. CODE § 39-20-07 (1980) (breathalyzer tests admissible if "fairly administered").

State v. Schimetz

In *State v. Schimetz*[266] the supreme court upheld Schimetz' conviction for aggravated assault and denied the defendant's motion for a new trial.[267] Testimony revealed that when Schimetz returned to his unattended car he discovered Scott in the front seat.[268] A struggle ensued,[269] and a short time after the scuffle Scott realized that he had been stabbed.[270] The jury, relying on circumstantial evidence, concluded that Schimetz was guilty of the stabbing.[271] The defendant contended that the evidence was insufficient to support a conviction for aggravated assault, that the trial court erred in refusing to give certain jury instructions, and that the court improperly admitted into evidence hearsay and lay opinion testimony.[272]

Concluding that sufficient circumstantial evidence existed to support the jury verdict, the supreme court stated that "circumstantial evidence alone may be sufficient to find a person guilty of the crime charged."[273] The supreme court declared that the trial court was correct in refusing the defendant's requested jury instructions.[274] These instructions would have required for a finding of an assault conviction that the defendant lacked an excuse for the alleged conduct.[275] The court reasoned that there was no evidence to support the requested jury instruction because the defendant neither admitted stabbing Scott nor offered proof that the use of force was necessary to prevent death, serious bodily injury, or the commission of a felony.[276] Furthermore, the court noted that the jury instructions did not need to mention the specific culpability for the crime of aggravated assault;[277] the trial court's instruction, which tracked the language of the aggravated assault statute,[278] adequately advised the jury that aggravated assault involves the willful causing of serious injury to another.[279]

In determining that the trial court correctly decided that a

266. 328 N.W.2d 808 (N.D. 1982).
267. State v. Schimetz, 328 N.W.2d 808, 815 (N.D. 1982).
268. *Id.* at 810.
269. *Id.*
270. *Id.* Upon returning to a party, Scott was informed that he had received a stab wound. *Id.*
271. *Id.* at 811.
272. *Id.*
273. *Id.*
274. *Id.* at 814.
275. *Id.* at 812.
276. *Id.* at 812-13.
277. *Id.* at 814.
278. *See* N.D. CENT. CODE § 12.1-17-02(1) (1969) (a person is guilty of aggravated assault, a class C felony, if he "[w]illfully causes serious bodily injury to another human being").
279. 328 N.W.2d at 814.

police officer's testimony was not hearsay evidence, the court observed that the confrontation clause[280] was satisfied because the defendant could cross-examine the officer.[281] The court concluded that the trial court properly admitted a lay witness' statement concerning the seriousness of Scott's wound because the testimony was not a legal or medical conclusion.[282] The court reasoned that the challenged testimony discussed a matter upon which any reasonable person could express his thoughts.[283]

State v. Trieb

In *State v. Trieb*[284] the supreme court held unconstitutional a jury instruction that stated that it is presumed that an unlawful act was done with unlawful intent.[285] Trieb was charged with murder because he intentionally and knowingly caused the death of another human being.[286] Trieb's chief defense was "lack of criminal responsibility by reason of mental disease or defect at the time of the alleged crime."[287]

Relying on *Sandstrom v. Montana*[288] and *State v. Sheldon,*[289] the court stated that the instruction deprived Trieb of his right to due process of law.[290] The court reasoned that the jury may have regarded the instruction as a mandatory presumption to find the requisite intent once it was convinced that the defendant committed the unlawful act.[291] Also, the jury may have viewed the presumption as shifting the burden of persuasion to the defendant.[292] The correct jury instructions on the presumption of innocence and on the burden of proof did not foreclose the

280. *See* U.S. CONST. amend. VI. ("In all criminal proceedings, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

281. 328 N.W.2d at 815. The court noted that the testimony was not offered in evidence to prove the truth of the matter asserted. *Id.*

282. *Id.* at 815.

283. *Id.*

284. 315 N.W.2d 649 (N.D. 1982).

285. State v. Trieb, 315 N.W.2d 649, 654 (N.D. 1982).

286. *Id.* at 651.

287. *Id.* The witnesses Trieb called stated that his youth was marked by turmoil, trauma, and neglect. In addition, the use of alcohol and drugs had become a constant factor in Trieb's life. *Id.*

288. 442 U.S. 510 (1979). The United States Supreme Court held that the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," violates the due process clause. Sandstrom v. Montana, 442 U.S. 510, 514 (1979).

289. 301 N.W.2d 604 (N.D. 1980), *cert. denied,* 450 U.S. 1002 (1981). Although the North Dakota Supreme Court held that the presumption of intent contained in North Dakota Pattern Jury Instruction 1313 was unconstitutional, the court reasoned that the presumption was harmless error because Sheldon was convicted of reckless endangerment, an offense that does not require the element of intent. State v. Sheldon, 301 N.W.2d 604, 613 (N.D. 1980), *cert. denied,* 450 U.S. 1002 (1981).

290. 315 N.W.2d at 652.

291. *Id.*

292. *Id.* The jury was not told that the presumption could be rebutted. *Id.*

possibility that the jury may have relied on the erroneous presumption in reaching its verdict.[293]

Trieb also asserted that the trial court erred in denying his request to instruct the jury on the crime of manslaughter as a lesser included offense of murder.[294] The court stated, however, that there was not a sufficient evidentiary basis adduced at trial to warrant a manslaughter conviction.[295]

EDUCATION LAW

Loney v. Grass Lake Public School District

In *Loney v. Grass Lake Public School District*[296] Loney appealed from an order of the district court that dissolved a temporary injunction against the Grass Lake Public School District and ordered Loney to accept or reject the teacher contract offered to her by the school district.[297] The appellant argued that even though she was the only certified teacher-employee within the school district, she had the right to negotiate with the school district under the provisions of chapter 15-38.1 of the North Dakota Century Code.[298]

The supreme court rejected the district court's interpretation of section 15-38.1-02(3)[299] and held that a teacher who is employed as the only certified teacher-employee of a school district constitutes an appropriate negotiating unit and is entitled to negotiate with the school board of the school district.[300] The court discerned that the purpose of the chapter is to promote improvement of personnel management and relations between school boards and their certified employees.[301] The court found an implied intent by the

293. *Id.* at 653. The court stated that the mere possibility that the jury reached its verdict in an impermissible manner is sufficient to require reversal. *Id.* at 656.

294. *Id.* at 656.

295. *Id.* at 657. The court stated that two questions must be answered in deciding whether a defendant is entitled to an instruction on a lesser included offense: "First, does the instruction include an offense which is a lesser included offense to the offense charged? Second, does the evidence in the case create a reasonable doubt as to the greater offense and support beyond a reasonable doubt a conviction of the lesser included offense?" *Id.* at 656.

296. 322 N.W.2d 470 (N.D. 1982).

297. Loney v. Grass Lake Pub. School Dist., 322 N.W.2d 470, 470 (N.D. 1982). The district court order, dated June 23, 1982, ordered the appellant either to accept or reject the proposed teacher contract by noon, July 8, 1982. *Id.*

298. *Id. See* N.D. CENT. CODE ch. 15-38.1 (1981) (negotiations between teachers and school boards).

299. *See* N.D. CENT. CODE § 15-38.1-02(3) (1981). The statute defines an appropriate negotiating unit as "a group of teachers having common interests, common problems, a common employer, or a history of common representation, which warrants that group being represented by a single representative organization in negotiations with a school board." *Id.*

300. 322 N.W.2d at 472.

301. *Id.* at 473. *See* N.D. CENT. CODE § 15-38.1-01 (1981) (purpose of Act is to provide public school certified employees with the right to be represented by professional organizations).

legislature to allow all certified teachers an opportunity for negotiations, including certified teachers in single teacher school districts.[302] The court stated that Loney may negotiate through a chosen representative organization as provided under the chapter[303] or may negotiate under self-representation as long as the school district is not wrongfully misled.[304]

Quarles v. McKenzie Public School District

In *Quarles v. McKenzie Public School District*[305] the plaintiff brought an action against the school board for wrongful nonrenewal of her teaching contract.[306] The school board restructured the school system and made a lower contract offer to the plaintiff.[307] When the plaintiff questioned the propriety of the proposed decrease in salary, the school board decided not to renew the plaintiff's contract.[308]

The question presented to the court was whether the reduced salary offered in the contract constituted a failure to renew the contract.[309] The supreme court held that a severe reduction in salary requires the school board to follow the nonrenewal procedures provided in section 15-47-27 of the North Dakota Century Code.[310] The court concluded that the school did follow the required procedures.[311]

FAMILY LAW

Briese v. Briese

In *Briese v. Briese*[312] the husband appealed from a district court judgment dividing property and awarding alimony in a divorce action.[313] The parties were divorced after thirty-one years of

302. 322 N.W.2d at 472-73.
303. *See* N.D. CENT. CODE § 15-38.1-01 (1981).
304. 322 N.W.2d at 473.
305. 325 N.W.2d 662 (N.D. 1982).
306. Quarles v. McKenzie Pub. School Dist., 325 N.W.2d 662, 663 (N.D. 1982).
307. *Id.*
308. *Id.* at 663-64.
309. *Id.* at 664.
310. *Id.* at 667. *See* N.D. CENT. CODE § 15-47-27 (1981) (teacher has a right to a hearing about nonrenewal).
311. 325 N.W.2d at 664. The court followed an earlier decision that interpreted § 15-47-27 of the North Dakota Century Code. *Id.* (citing Enstad v. North Central of Barnes Pub. School Dist., 268 N.W.2d 126 (N.D. 1978) (teacher has no further reemployment rights after rejecting a reasonable offer of reemployment)). The court also considered § 15-47-38 of the North Dakota Century Code. 325 N.W.2d at 670. *See* N.D. CENT. CODE § 15-47-38 (1981) (requirements for the reasons for nonrenewal).
312. 325 N.W.2d 245 (N.D. 1982).
313. Briese v. Briese, 325 N.W.2d 245, 246 (N.D. 1982).

marriage and had nine children.[314] The district court awarded the wife one-half of the property and five hundred dollars in alimony per month until the husband retired and one-third of his retirement benefits thereafter.[315] The husband appealed on the grounds that he was entitled to a greater portion of the divided property because most of it was acquired through his skill and labor.[316] The husband also contended that the property division was inequitable because it could cause him to bear a disproportionate share of the income tax burden if the Internal Revenue Service (IRS) should treat him as sole owner of the property for income tax purposes.[317] He also objected to the award of alimony on the ground that it served no rehabilitative purpose.[318]

The supreme court held that considering the wife's age, her level of education, her physical condition, and her service as a homemaker in raising nine children during the thirty-one years of marriage, it could not set aside the trial court's division of property as being clearly erroneous.[319] The supreme court stated that the wife's contribution to the home as wife and mother was not an insignificant contribution to the marriage.[320] The court concluded that section 14-05-24 of the North Dakota Century Code empowers the trial court to make such an equitable distribution of the property as may seem just and proper.[321]

The supreme court rejected the husband's contention that he would bear a disproportionate share of the income tax burden.[322] The court stressed that the parties stipulated that the trial court's order concerning equal apportionment of capital gains would include all federal income tax consequences.[323] The court refused to modify the trial court's division of property in the event that the IRS treated the husband as sole owner of marital property for income tax purposes, rather than as joint owner with the wife.[324] The court stated that the husband was in effect asking the court to modify the division of property on the basis of a tax contingency that might never occur and over which the supreme court had no jurisdiction.[325]

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314. *Id.*
315. *Id.*
316. *Id.* at 247.
317. *Id.* at 247-48.
318. *Id.* at 249.
319. *Id.* at 247. *See* Williams v. Williams, 302 N.W.2d 754, 757 (N.D. 1981) (guidelines for a trial court in determining an equitable distribution of property in a divorce action).
320. 325 N.W.2d at 247.
321. *Id. See* N.D. CENT. CODE § 14-05-24 (1971) (permanent alimony and division of property).
322. 325 N.W.2d at 248.
323. *Id.*
324. *Id.*
325. *Id.*

The court found that the alimony award was also within the discretion of the trial court,[326] which had considered the wife's age, health, education, and work experience.[327] The husband argued that the alimony award was erroneous because it served no rehabilitative purpose.[328] The court rejected this argument because it could reasonably conclude from the trial court record that rehabilitation beyond the wife's present earning capacity was not likely.[329]

Jacobson v. Jacobson

In *Jacobson v. Jacobson*[330] the supreme court held that a district court's award of child custody to a homosexual mother in a divorce action was clearly erroneous.[331] The district court determined that both parents were "fit, willing and able to assume the custodial role,"[332] but concluded that maintaining the children in the mother's custody would serve the best interests of the children.[333] Under the circumstances of this case,[334] the supreme court said that because of the mother's homosexual living arrangement and the mores of society, giving the father custody would best serve the interests of the children.[335]

Mansukhani v. Pailing

In *Mansukhani v. Pailing*[336] Jenny (Pailing) Mansukhani sought custody of her children by filing a petition for a writ of habeas corpus, the district court awarded Jenny custody, and the grandparents appealed.[337] The supreme court reversed, awarding custody of the children to the grandparents.[338]

James and Jenny Pailing were married in 1974.[339] Two children were born of the marriage.[340] In January of 1976 James

326. *Id.* at 249. The supreme court noted in *Williams v. Williams* it distinguished the concepts of equitable property division and alimony on the ground that the concepts have different purposes. *Id.* (noting Williams v. Williams, 302 N.W.2d 754, 758 (N.D. 1981)).
327. 325 N.W.2d at 249.
328. *Id.*
329. *Id.*
330. 314 N.W.2d 78 (N.D. 1982).
331. Jacobson v. Jacobson, 314 N.W.2d 78, 80 (N.D. 1982).
332. *Id.*
333. *Id.* at 79.
334. *Id.* at 80.
335. *Id.* at 82.
336. 318 N.W.2d 748 (N.D. 1982).
337. Mansukhani v. Pailing, 318 N.W.2d 748, 749 (N.D. 1982).
338. *Id.*
339. *Id.* at 749.
340. *Id.*

and Jenny separated, and Jenny returned with the children to her parents' home in Drake, North Dakota.[341] In December of 1976 Jenny asked her mother to take the children to their father. At that time James Pailing was living in Butte with his parents, Donald and Jean Pailing.[342] In 1977 James and Jenny lived together in Minot for about six weeks; the children remained in Butte with Donald and Jean Pailing.[343] James and Jenny were divorced on October 6, 1977, and James was awarded custody of the children.[344] During this time the children continued to live with their grandparents as they had since December of 1976.[345] In 1980 James Pailing was killed, and Jenny sought custody of her children.[346]

In reversing the district court's award, the supreme court first set forth the test to be used in determining custody in a divorce action.[347] The proper test is the best interests of the child.[348] The supreme court stated that the district court's reliance on the fitness of the mother was improper and erroneous.[349]

The court restated the test for determining whether custody should be awarded to the grandparents or to the natural parents.[350] The supreme court in *Hust v. Hust*[351] stated that an award of custody to the grandparents instead of a natural parent is clearly erroneous unless exceptional circumstances exist that require such a disposition in the best interests of the child.[352]

The supreme court said that the district court had arbitrarily disregarded expert testimony indicating that it would be detrimental to the children to place them in the custody of their mother.[353] One psychologist testified that the children considered their grandparents as their psychological parents and that it would be difficult for them to adjust to living with their mother.[354] Another psychologist stated that the only family the children could

341. *Id.*
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.* After her husband's death, Jenny Pailing sought custody and asked the grandparents to give her the children. When they refused, she filed a petition for a writ of habeas corpus. The district court gave Jenny custody, and the grandparents appealed. The supreme court remanded the case for an evidentiary hearing on the issue of custody. *Id.* at 750. *See* Mansukhani v. Pailing, 300 N.W.2d 847 (N.D. 1980). The district court again awarded the mother custody. 318 N.W.2d at 750. This case is a result of the grandparents' second appeal. *Id.*
347. 318 N.W.2d at 751.
348. *Id.*
349. *Id.*
350. *Id.*
351. 295 N.W.2d 316 (N.D. 1980).
352. Hust v. Hust, 295 N.W.2d 316, 319 (N.D. 1980).
353. 318 N.W.2d at 751.
354. *Id.*

conceptualize was that of their grandparents.[355] The expert testimony showed a strong psychological parent relationship between the children and their grandparents and a lack of a personal relationship between the children and their mother.[356] The court also stressed the importance of continuity and stability in the children's lives.[357]

The expert testimony and the children's need for continuity and stability constituted exceptional circumstances;[358] the district court's award of custody to the mother was, therefore, clearly erroneous.[359]

Mortenson v. Tangedahl

In *Mortenson v. Tangedahl*[360] Terry Baustad, the noncustodial parent, appealed from a final decree of adoption.[361] The decree of adoption terminated Baustad's parental rights and approved the adoption of his children by Wesley Mortenson.[362] Baustad did not consent to the adoption.[363] The petition for adoption alleged that the natural father had not consented to the adoption, but that his consent was unnecessary because it was excused under section 14-15-06(1)(b) of the North Dakota Century Code.[364]

On appeal, Baustad contended that the adoptive father did not meet his statutory burden of proving that Baustad failed significantly and without justifiable cause to communicate with his children for a period of one year.[365] Baustad contended that as a result of Mortenson's failure of proof, the district court erred in holding that Baustad's consent was not required.[366] The supreme court affirmed the final decree of adoption, holding that the facts supported the trial court's finding.[367]

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355. *Id.*
356. *Id.* at 753.
357. *Id.*
358. *Id.*
359. *Id.* at 755.
360. 317 N.W.2d 107 (N.D. 1982).
361. Mortenson v. Tangedahl, 317 N.W.2d 107, 108 (N.D. 1982).
362. *Id.*
363. *Id.*
364. *Id. See* N.D. CENT. CODE § 14-15-06(1)(b) (1981). Section 14-15-06(1)(b) provides:

> Consent to adoption is not required of . . . [a] parent of a child in the custody of another, if the parent for a period of at least one year has failed significantly without justifiable cause (i) to communicate with the child or (ii) to provide for the care and support of the child as required by law or judicial decree.

Id.
365. 317 N.W.2d at 108.
366. *Id.*
367. *Id.* at 115.

In determining that the facts sustained the trial court's decision, the court examined the two major factors considered by the trial court.[368] Baustad saw his children only twice in the twelve months preceding the filing of the petition.[369] Both contacts were initiated by the children.[370] Baustad did not contend that the court's findings were erroneous, but that its conclusion was not supported by the evidence.[371] Baustad argued that his communications obviated the statute and that as a result his consent was necessary for the adoptions.[372] The court interpreted the word significantly to mean important or momentous and concluded that Baustad's communications had been neither.[373] The court reasoned that because Baustad failed significantly to communicate with his children, his consent to the adoption was not required.[374]

Pritchett v. Social Service Board

In *Pritchett v. Social Service Board*[375] the supreme court had its first opportunity to determine the proper scope of review to apply to a termination of parental rights action under the Revised Uniform Adoption Act.[376] The court held that the review should be in the form of a de novo proceeding[377] in the same manner as under the Uniform Juvenile Court Act.[378] The court then found that the natural father had abandoned his child and that the trial court correctly terminated his parental rights.[379]

In a special concurrence, Justice Pederson noted that rule 52(a) of the North Dakota Rules of Civil Procedure[380] applies "in all actions tried upon the facts without a jury," and therefore, he could find no law or theory to support a trial de novo.[381]

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368. *Id.* at 112.
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.*
373. *Id.* at 113. The court distinguished cases with similar statutes that lacked the word significantly. *Id.* at 114.
374. *Id.* at 115.
375. 325 N.W.2d 217 (N.D. 1982).
376. Pritchett v. Social Serv. Bd., 325 N.W.2d 217, 219-20 (N.D. 1982). *See* N.D. CENT. CODE § 14-15-19(3)(a) (1981) (Revised Uniform Adoption Act: relinquishment and termination of parental rights).
377. 325 N.W.2d at 220. *See In re* F.H., 283 N.W.2d 202, 211 (N.D. 1979) (clearly erroneous rule does not apply).
378. 325 N.W.2d at 220. *See* N.D. CENT. CODE § 27-20-44(1)(a) (1981) (Uniform Juvenile Court Act: termination of parental rights).
379. 325 N.W.2d at 222.
380. See N.D.R. CIV. P. 52(a) (clearly erroneous standard applies "in all actions tried upon the facts without a jury").
381. 325 N.W.2d at 223 (Pederson, J., concurring).

INSURANCE

Aberle v. Karn

In *Aberle v. Karn*[382] third-party defendants, Commercial Insurance Company and St. Paul Fire and Marine Insurance Company, sought declaratory relief to determine liability coverage.[383] The underlying action arose out of the alleged negligent operation of a motor vehicle by the insured's employee.[384] The St. Paul policy specifically excluded that particular employee from coverage.[385] The insured denied liability, cross-claimed against the employee, and brought into the case as third-party defendants the insurance companies, each of whom had denied coverage to the insured and refused to defend.[386] The insurance companies sought a declaratory judgment to determine which, if either, company had coverage and a duty to defend.[387]

The district court held that St. Paul Fire and Marine was liable for coverage and that the exclusion contained in its policy was void as against public policy.[388] The supreme court reversed and remanded in a three-to-two decision.[389]

The supreme court considered two issues: whether the grant of declaratory relief was proper under the circumstances of the case[390] and whether the insurer's specific exclusion of an individual under a policy violates public policy.[391] With respect to the first issue, the court held that the insurer was in a better position to determine if it should defend, based upon its investigation of the facts and research of applicable law, than was the court, which must make "a speculative determination based upon minimum facts."[392] The court also suggested that to properly grant declaratory relief "there must be a showing of how the declaration aids in the disposition of the basic controversy."[393] Because the district court's relief did not aid in the disposition of the underlying negligence claim, that relief was unwarranted.[394] The court recognized that its decision placed a burden on the insurance companies because an insurer's decision

382. 316 N.W.2d 779 (N.D. 1982).
383. Aberle v. Karn, 316 N.W.2d 779, 781 (N.D. 1982).
384. *Id.* at 780.
385. *Id.* at 784.
386. *Id.* at 781.
387. *Id.*
388. *Id.* at 784.
389. *Id.* at 783-84.
390. *Id.* at 782.
391. *Id.* at 784.
392. *Id.* at 783.
393. *Id.* at 782.
394. *Id.*

not to defend entails "the risk that that action may be claimed later to be bad faith, permitting a tort claim" by the insured.[395]

The supreme court also reversed the district court's decision regarding the specific exclusion contained in the St. Paul policy.[396] This reversal followed from the reversal of the district court's grant of declaratory relief.[397] The majority opinion implied that such an exclusion might be void as against public policy,[398] but the court held that such a determination was improper at the declaratory relief stage.[399]

JUVENILES

Bergstrom v. Bergstrom

In *Bergstrom v. Bergstrom*[400] the supreme court considered whether a parent's remarriage and move to a foreign country created changed circumstances under which a child's best interests dictated that a previous custody order be modified to allow the parent to remove the child from the United States.[401] The supreme court ruled that the trial court's denial of the modification motion was not "clearly erroneous."[402]

In a previous decision[403] the supreme court awarded the parents joint custody of the child conditioned, in part, on the mother's maintaining a United States residence for the child.[404] In a subsequent modification hearing following a remand of the case to the district court, the district court granted permanent custody to the father during the school year and to the mother during the summer.[405] The district court also denied the mother's request to take her daughter outside the United States for purposes of visitation.[406]

The mother appealed the modified order, claiming that her recent remarriage and move to a foreign country created changed circumstances dictating that it would be in her child's best interest

395. *Id.* at 783.
396. *Id.* at 784.
397. *Id.*
398. *Id.* The court stated that "there may be some basis in § 26-41-04, NDCC, to support a conclusion that public policy should void the . . . exclusion here." *Id. See* N.D. CENT. CODE § 26-41-04 (1978) (indicates security requirements for owners and operators of motor vehicles in North Dakota).
399. 316 N.W.2d at 784.
400. 320 N.W.2d 119 (N.D. 1982).
401. Bergstrom v. Bergstrom, 320 N.W.2d 119, 123 (N.D. 1982).
402. *Id.*
403. Bergstrom v. Bergstrom, 296 N.W.2d 490 (N.D. 1980).
404. *Bergstrom,* 320 N.W.2d at 120.
405. *Id.*
406. *Id.*

to allow the child to visit outside the United States.[407] She also contended that the restriction on her award of custody deprived her of her parental rights.[408] Finally, she asserted that the trial court was not required by the supreme court's earlier decision to restrict the child's overseas visitation.[409]

The supreme court agreed that the trial court read the supreme court's earlier decision too broadly,[410] but found that the trial court's custody determination was nevertheless based on the child's best interest and therefore was not "clearly erroneous."[411] The court noted further that while a parent has a fundamental right to his or her child, this right is not absolute, but is subordinated in a custody dispute to what is best for the child.[412]

PROPERTY

McLain v. Midway Township

In *McLain v. Midway Township*[413] the McLains brought an action against Midway Township, claiming damages for the township's refusal to grant them permission to move a house into the township.[414] A township zoning ordinance required all property owners within a one-half mile radius of the proposed site to sign a petition consenting to the moving of a building or house into the township.[415] The McLains attempted to comply with the ordinance, but did not obtain the required signatures.[416] The McLains asserted that the zoning ordinance was unconstitutional and that the township board acted unlawfully in refusing to permit them to move their house.[417] The district court awarded damages to the McLains.[418]

On appeal the supreme court held that despite the conceded unconstitutionality of the zoning ordinance,[419] Midway Township

407. *Id.* at 123.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.* at 123-24.
412. *Id.* at 123.
413. 326 N.W.2d 196 (N.D. 1982).
414. McLain v. Midway Township, 326 N.W.2d 196, 198 (N.D. 1982).
415. *Id.* at 197. The township zoning administrator told the McLains to rezone the property on which they wished to place their house. *Id.* He also asked them to submit a formal plat. *Id.*
416. *Id.* The McLains believed they had obtained all the necessary signatures on the first petition, but the township board of supervisors advised them that they needed additional signatures. *Id.* The McLains circulated a second petition, but this petition failed to state that the McLains intended to move a house onto the property. *Id.* The McLains circulated a third petition, but they did not obtain all the required signatures. *Id.*
417. *Id.* at 198.
418. *Id.* at 196.
419. *Id.* at 199.

was statutorily immune from liability for damages based on the property owners' decision to deny permission.[420] The court noted that section 32-12.1-03(3) of the North Dakota Century Code[421] specifically provides for township immunity.[422]

420. *Id.*
421. *See* N.D. CENT. CODE § 32-12.1-03(3) (Supp. 1981) (liability of political subdivisions).
422. 326 N.W.2d at 198.

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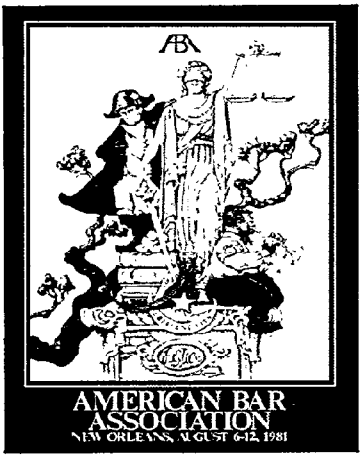

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